

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OFFICE OF THE SECRETARY OF STATE

In the Matter of Proposed Amendments
to Rules Governing Voter Registration
and Absentee Balloting, Minnesota
Rules, Chapters 8200 and 8210.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge (“ALJ”) Richard C. Luis conducted a hearing concerning the above-entitled rules proposed by the Minnesota Office of the Secretary of State (“OSS” or “Secretary of State”) on January 25, 2008, in Suite 106, 60 Empire Drive, Saint Paul, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in the rules’ being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the Secretary of State’s hearing panel were Beth Fraser, Director of Governmental Affairs; and Gary Poser, Director of Elections. Fourteen members of the public signed the hearing register.

The Secretary of State and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set at twenty calendar days (February 14, 2008), to allow interested persons and the OSS an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days (February 22, 2008), to allow interested persons and the OSS the opportunity to file a written response to the comments received during the initial period. Numerous

¹ Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2006 edition, and all references to Minnesota Rules are to the 2007 edition.)

comments were received during the rulemaking process. The hearing record closed for all purposes on February 22, 2008.

NOTICE

The Secretary of State must make this Report available for review by anyone who wishes to review it for at least five working days before the OSS takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the OSS makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Secretary of State must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Elections Division of the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the OSS, and the OSS will notify those persons who requested to be informed of their filing.

Based on the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background and Nature of the Proposed Rules

1. The primary purpose of the Secretary of State's Rules Governing Voter Registration and Absentee Balloting is to establish the form of voter registration applications, create uniform forms and procedures, facilitate voter access to the electoral process, and to adopt rules for the maintenance of the statewide voter registration system as set forth in Minn. Stat. § 201.221, subds. 1 and 2.² The proposed rules and rule amendments in the proceeding cover a variety of areas relating to voter registration and absentee balloting, including changes to the voter registration form, changes to the forms of identification acceptable for same-day voter registration, and changes to the form of registration for Minnesotans living outside the country for a brief time.

2. Among other changes, the proposed rules amend rule Part 8200.1100 by changing the size of voter registration applications from 6 x 8-9/16 inches to 8-1/2 x 11 inches and changing the weight of paper required to print these applications, and the exact specifications for printing the applications.³ An amendment to 8200.1200 requires mail-in applications to provide reference to the location where a voter can find a privacy

² Statement of Need and Reasonableness ("SONAR") at 1.

³ Exhibit ("Ex.") 9 at 1-2; SONAR at 10-11.

statement, and requires same-day registration applications to provide a privacy statement on the application itself.⁴

3. The proposed rules add a part which requires that any federal postcard application received from a member of the armed forces of the United States or from a person residing in Minnesota but temporarily living in another country be processed as a voter registration application.⁵

4. The proposed rules include a number of changes to Part 8200.5100 (Registration at Precinct Only). The proposed amendments remove subpart 1(A)(3), which allowed a student to prove residence by presenting a student ID that contained the student's address, a current fee statement that contained a valid address in the precinct, or a copy of a current student registration card that contains the student's valid address in the precinct.⁶ The amendment proposing to change subpart 1(A) also alters the form of tribal identification allowed for same-day registration by removing a reference to Minnesota Statutes, section 201.061 and stating instead the requirements for a tribal identification.⁷ The amendment to subpart 1(E) allows residential facilities to provide a list of current employees to election officials on the day of election. These employees can then vouch for the residency of same-day voter applicants who live in the residential home.⁸

5. The proposed rules modify Part 8200.5100, subpart 2(A)(5), the requirement for tribal identification, in the same manner as the above-noted change.⁹ In addition, the amendments change Part 8200.5100 subpart 2(B) to allow a voter to use an original bill for telephone, television or Internet provider services, regardless of how those services are delivered, rather than restricting the acceptable bills to the previous standard household services bills.¹⁰ These changes also allow a voter to use a rent statement from a landlord that itemizes utilities expenses, or a current student fee statement that contains the student's valid address as acceptable proof of residence.¹¹ The proposed changes add Part 8200.5100, subpart 4, which provides a new method for voters to prove residence for a November election through a postsecondary institution's voluntary provision of a list of current enrolled students and their addresses to the Secretary of State's office no earlier than 30 days and no later than 25 days prior to the November election.¹²

6. The proposed changes amend Part 8200.9115, subpart 3 (Production of rosters). Under the proposed changes the roster may be provided to the county auditor

⁴ Ex. 9 at 2; SONAR at 12.

⁵ Ex. 9 at 3; SONAR at 12.

⁶ Ex. 9 at 4; SONAR at 12.

⁷ *Id.*

⁸ Ex. 9 at 4-6; SONAR at 13-14.

⁹ Ex. 9 at 6; SONAR at 13.

¹⁰ Ex. 9 at 7; SONAR at 14-15.

¹¹ *Id.*

¹² Ex. 9 at 8-10; SONAR at 15-19.

in any mutually agreed upon medium, rather than the previous requirement of paper, computer tape or other electronic medium.¹³

7. The amendments propose removing Part 8200.9315, item D, which requires the secretary of state or county auditor to notify the appropriate county auditor if the applicant moved from another county in the state where he was registered to vote.¹⁴

8. The amendments propose removing the oath currently used under 8200.9939, and replacing it with various forms of registration oaths that include persons who are themselves registered to vote, or are employees in a residential facility.¹⁵ In addition, the amendments propose adding Part 8200.9940, which allows election judges to keep track of the number of persons for whom a voter signs proof-of-residence oaths.¹⁶

9. In addition, the amendments propose adding rule Part 8200.9960, which provides an example of the form to be used when a voter registration is challenged.¹⁷

10. The amendments provide for an addition to Part 8210.0500, subpart 1. This addition requires the absentee ballot instructions to include a graphic depiction of the absentee ballot materials and how they are to be assembled by the voter. The Secretary of State must provide each county auditor with a “sample graphic depiction.”¹⁸

11. The proposed rules amend Part 8210.0500, subpart 2, by changing the word “unregistered” to “registered” in front of voters in the title. All previous instructions following this title are removed from the rules. They are replaced by new detailed instructions for absentee voters.¹⁹ The proposed rules change subpart 3 by changing the word “registered” to “unregistered” in front of voters in the title. All previous instructions following this title are removed from the rule and are replaced by detailed instructions for absentee voters who are unregistered, challenged, or have an incomplete registration.²⁰

12. The proposed rules amend Part 8210.0500, subpart 4, regarding instructions for military and overseas voters. These changes remove all previous instructions and replace them with detailed instructions for filling out an absentee ballot.²¹ The amendments also include changes to Part 8210.0600 (Statement of Absentee Voter).

¹³ Ex. 9 at 12; SONAR at 18.

¹⁴ *Id.*

¹⁵ Ex. 9 at 13-14; SONAR at 18.

¹⁶ Ex. 9 at 14-16; SONAR at 19.

¹⁷ Ex. 9 at 16-17; SONAR at 19.

¹⁸ Ex. 9 at 21; SONAR at 21.

¹⁹ Ex. 9 at 21-25; SONAR at 21.

²⁰ Ex. 9 at 25-29; SONAR at 21.

²¹ Ex. 9 at 29-32; SONAR at 21.

These changes require that the statements for absentee voters follow the new instructions provided in the above-amended subparts.²²

II. Compliance with Procedural Rulemaking Requirements

13. On June 22, 2007, the Secretary of State filed a proposed additional notice plan for its Request for Comments with the Office of Administrative Hearings and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of June 25, 2007, Administrative Law Judge Eric L. Lipman approved the additional notice plan.

14. On July 2, 2007, the OSS published in the State Register its Request for Comments on the Secretary of State's intention to amend its rules governing voter registration and absentee balloting. The notice indicated that OSS had not yet prepared a draft of the possible rule and requested comments on proposed criteria.²³

15. As required by Minn. Stat. § 14.131, the OSS asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated November 30, 2007.²⁴

16. On December 4, 2007, the OSS filed copies of the proposed Notice of Hearing, proposed rules, and draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the OSS also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter of December 6, 2007, the Administrative Law Judge approved the additional notice plan.

17. On December 20, 2007, the Secretary of State mailed the Notice of Hearing to all persons and associations who had registered their names with the OSS for the purpose of receiving such notice.²⁵ The Notice contained the elements required by Minn. R. 1400.2080, subp. 2. The Notice identified the date and location of the hearing in this matter. The Notice also announced that the hearing would continue until all interested persons had been heard.

18. At the hearing, the OSS filed copies of the following documents as required by Minn. R. 1400.2220:

A. the Request for Comments as published in the *State Register* on July 2, 2007 (32 S.R. 25);²⁶

²² Ex. 9 at 32; SONAR at 22.

²³ 32 State Register 25 (July 2, 2007); Ex. 23.

²⁴ SONAR at 6.

²⁵ Ex. 26.

²⁶ Ex. 23.

- B. the proposed rules dated December 4, 2007, including the Revisor's approval;²⁷
- C. the Statement of Need and Reasonableness (SONAR);²⁸
- D. the Notice of Hearing as mailed on December 20, 2007;²⁹
- E. the Notice of Hearing as published in the *State Register* on December 24, 2007 (32 S.R. 1116);³⁰
- F. the certification that the OSS mailed a copy of the SONAR to the Legislative Reference Library on December 20, 2007;³¹
- G. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and to the Parties Identified in the Additional Notice Plan on December 20, 2007;³²
- H. the Certificate of Accuracy of the Mailing List as of December 20, 2007;³³
- I. the Certificate of Sending the Notice of Hearing and the SONAR to various legislators on December 20, 2007, accompanied by a copy of the transmittal letter;³⁴
- J. two sample Minnesota Voter Registration Applications, one with a Voucher Form and one without; and Absentee Instructions for Voters;³⁵
- K. a Court Order implementing Minn. Stat. § 204B.44, dated November 7, 2006, and Verified Petition Under Minn. Stat. § 204B.44;³⁶
- L. Addendum to the Statement of Need and Reasonableness;³⁷ and
- M. public comments received by the OSS and the Office of Administrative Hearings prior to the hearing.³⁸

²⁷ Ex. 9.

²⁸ Ex. 1.

²⁹ Ex. 2.

³⁰ Ex. 25.

³¹ Ex. 24.

³² Ex. 26.

³³ Ex. 27.

³⁴ Ex. 28.

³⁵ Exs. 3, 4, and 5.

³⁶ Exs. 6 and 7.

³⁷ Ex. 8.

³⁸ Exs. 10-22. (Please note that Ex. 20 is a duplication of Ex. 8.)

19. The Administrative Law Judge finds that the Secretary of State has met all of the procedural requirements under applicable statutes and rules.

III. Statutory Authority

20. In its SONAR, the Secretary of State asserts that its statutory authority to adopt these rules regarding voter registration is contained in Minn. Stat. §§ 201.221, subds. 1 and 2, and 201.061, subd. 3 (a) (2) and (3).³⁹ Subdivision 1 of Minn. Stat. § 201.221, requires that the Secretary of State implement the provisions of the chapter by adopting rules consistent with federal and state election laws. Subdivision 2 specifies that the “[t]he secretary of state shall assist local election officers by devising uniform forms and procedures. The secretary of state shall provide uniform rules for maintaining voter registration records on the statewide registration system.” Most significantly, Minn. Stat. § 201.061, subds. 3 (a)(2) and 3 (3), state that voters may prove residence for the purposes of registering by:

(2) presenting any document approved by the secretary of state as proper identification;

(3) presenting one of the following:

(i) a current valid student identification card from a postsecondary educational institution in Minnesota, if a list of students from that institution has been prepared under section 135A.17 and certified to the county auditor in the manner provided in rules of the secretary of state

21. As to absentee voting, the OSS states that its statutory authority to adopt rules is set forth in Minn. Stat. § 203B.09, which provides:

The secretary of state shall adopt rules establishing the form, content, and type size and style for the printing of blank applications for absentee ballots, absentee voter lists, return envelopes, certificates of eligibility to vote by absentee ballot, ballot envelopes and directions for casting an absentee ballot. Any official charged with the duty of printing any of these materials shall do so in accordance with these rules.

22. The Administrative Law Judge finds that the Secretary of State has general statutory authority to adopt the proposed rules.

IV. Additional Notice Requirements

23. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, the Secretary of State submitted two additional notice

³⁹ SONAR at 1-2.

plans to the Office of Administrative Hearings, which were reviewed and approved by the Administrative Law Judge in letters dated June 25, 2007, and December 6, 2007. During the rulemaking hearing, the OSS introduced evidence that certified provision of notice to those on the rulemaking mailing list maintained by the OSS and in accordance with its additional notice plan.⁴⁰

24. The OSS took action to inform and involve the following interested and affected parties in this rulemaking:

- A. Policymakers, especially in the Legislature, who have oversight of this subject matter;
- B. Political parties;
- C. Professional election administrators;
- D. Former Secretaries of State;
- E. Local and municipal governments that actually implement elections;
- F. Public and private college student and administration organizations;
- G. Lawyers with expertise in elections matters; and
- H. Public policy groups representing a spectrum of views held within the general public.⁴¹

25. A copy of the proposed rules, the Notice of Hearing, and the SONAR were all available on the Secretary of State's website.

26. The OSS has widely disseminated the proposed rules to affected parties. Therefore, the Administrative Law Judge finds that the OSS has satisfied the notice requirements.

V. Impact on Farming Operations

27. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

⁴⁰ Exs. 26 and 27.

⁴¹ SONAR at 8-10.

28. The proposed rules do not affect farming operations, and the Administrative Law Judge concludes that the OSS did not, and was not required to, notify the Commissioner of Agriculture.

VI. Compliance with Other Statutory Requirements

A. Cost and Alternative Assessments

29. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

30. With respect to the first factor, in its SONAR the Secretary of State recognized two groups; those who will benefit from the proposed rule changes and those who will be affected by the proposed changes. The groups that stand to benefit are the Secretary of State's Office, election officials, election judges and eligible voters. Those who will be affected by the proposed rules are the Secretary of State's office, election offices and local governments, and the public because election costs are ultimately borne by the taxpayers.⁴²

⁴² SONAR at 2-4.

31. With respect to the second requirement, the OSS noted that the OSS itself will bear some of the costs to implement the proposed rules. The SONAR stated that the new voter application forms would cost approximately .0177 cents more per piece to print, resulting in an increased cost of just over \$53,000 this year.⁴³ At the public hearing, the Secretary of State provided an addendum to the SONAR that reduced that amount, stating, there would be fewer applications printed, they would cost approximately .016 cents more per piece, and the additional cost to the OSS would be approximately \$16,000 this year.⁴⁴ In addition, the Secretary of State will incur costs involved in programming its computers to process data submitted pursuant to the proposed rules. This cost is expected to be a one-time cost of approximately \$24,000.⁴⁵ The Agency asserts the proposed rules will result in no additional costs to other agencies.⁴⁶

32. With respect to the third element, the OSS must determine if there are less costly or less intrusive methods to achieve the purposes of the proposed rules. The OSS addresses this element in its rule-by-rule analysis in the SONAR.⁴⁷ In the rule-by-rule analysis of the SONAR, the Secretary of State asserts that the proposed changes are the least intrusive and most clear means of amending the rules.⁴⁸

33. With respect to the fourth requirement, the OSS must describe any alternate methods the OSS considered and the reasons they were rejected. In its SONAR the Secretary of State asserts that this requirement is addressed in its rule-by-rule analysis.⁴⁹ It does not appear that the Secretary of State seriously considered any other alternatives to the rulemaking process.

34. With respect to the fifth factor, the Secretary of State must note the probable cost of complying with the proposed rules. The OSS asserts local governments will not incur any costs with relation to training election judges to comply with these new rules, because local governments already train election judges.⁵⁰ The OSS asserts that local governments will not incur additional printing costs because although the voter registration applications will be on larger paper, the rule allows consolidation of two forms for same-day registration and lighter paper than was previously required. Therefore, the Secretary of State argues that the rule will actually save the local governments money.⁵¹ The OSS notes that any increased costs will ultimately be borne by the public.⁵²

⁴³ SONAR at 4.

⁴⁴ Ex. 8.

⁴⁵ SONAR at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ SONAR at 10-22.

⁴⁹ SONAR at 4.

⁵⁰ SONAR at 5-6.

⁵¹ *Id.*

⁵² *Id.*

35. With respect to the sixth factor, the OSS asserts that the cost of not adopting these rules will result in a cost of \$8,000 more than the cost of adopting these rules. This is because the Secretary of State asserts local governments will save money under the new printing guidelines.⁵³

36. With respect to the seventh factor, the Secretary of State asserts there is nothing in the proposed rules that conflicts with federal regulations.⁵⁴

37. The Administrative Law Judge concludes that the OSS has fulfilled its obligation under Minn. Stat. § 14.131 to discuss costs and alternative assessments in the SONAR.

B. Performance-Based Regulation

38. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it “considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.” Section 14.002 states, in relevant part, that “whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.”

39. The Secretary of State explained in the SONAR that many of the proposed rules are its responses to recent legislative changes. However, the OSS has taken the further step of searching for other rules that impede superior achievement and the cost-effective delivery of services. The OSS has worked with local election officials and average voters to identify areas for improvement, and has proposed changes to the rules in light of these discussions. The OSS asserts that the proposed rules give guidance about how certain election forms should look and how certain data will be compiled, but also leave flexibility for local election officials to determine how to provide these items to election judges and voters. The proposed rules also allow for greater efficiency and cost-effectiveness by centralizing the student data for post-secondary institutions and breaking it down by precinct for the local election officials. Taken as a whole, the Secretary of State believes these changes will improve the overall performance of election administration.⁵⁵

40. The Administrative Law Judge finds that the OSS has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

⁵³ SONAR at 5-6, and Ex. 8.

⁵⁴ SONAR at 6.

⁵⁵ SONAR at 7.

C. Consultation with the Commissioner of Finance

41. Under Minn. Stat. § 14.131, the agency is also required to “consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

42. The Secretary of State sent its proposed rule to the Commissioner of Finance on November 30, 2007.⁵⁶ On behalf of the Commissioner of Finance, Executive Budget Officer Abigail Read replied on November 30, 2007. This response affirms the OSS’s assertion that the proposed rules will have some financial impact upon local governments, but that this impact should be offset by process improvements and cost saving opportunities afforded by the rule.⁵⁷

43. The Administrative Law Judge finds that the Secretary of State has met the requirements set forth in Minn. Stat. § 14.131 for consulting with the Commissioner of Finance.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

44. Effective July 1, 2005, under Minn. Stat. § 14.127, the OSS must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁵⁸ The Secretary of State must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁹

45. In the SONAR, the OSS stated that the proposed rules are not anticipated to increase costs by more than \$25,000 for any small business or small city.⁶⁰ The Secretary of State received support for this proposition from the Commissioner of Finance and the small city of Lanesboro.⁶¹

46. The Administrative Law Judge finds that the Secretary of State has made the determination required by Minn. Stat. § 14.127 and approves that determination.

VII. Rulemaking Legal Standards

47. Under Minnesota law,⁶² one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support

⁵⁶ SONAR at 6.

⁵⁷ *Id.* See also, attachment to the Secretary of State’s comments dated February 22, 2008.

⁵⁸ Minn. Stat. § 14.127, subd. 1.

⁵⁹ Minn. Stat. § 14.127, subd. 2.

⁶⁰ SONAR at 6.

⁶¹ *Id.* See also, attachment to the Secretary of State’s comments dated February 22, 2008.

⁶² Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.⁶³ The Secretary of State prepared a Statement of Need and Reasonableness (SONAR) in support of its proposed rules. At the hearing, the OSS relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by an addendum,⁶⁴ comments made by OSS staff at the public hearing, and by the OSS written post-hearing comments and reply.

48. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.⁶⁵ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁶⁶ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.⁶⁷ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."⁶⁸

49. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.⁶⁹

50. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Secretary of State complied with the rule adoption procedure, whether the rule grants undue discretion, whether the OSS has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.⁷⁰

⁶³ *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁶⁴ Ex. 8.

⁶⁵ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

⁶⁶ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

⁶⁷ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

⁶⁸ *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

⁶⁹ *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

⁷⁰ Minn. R. 1400.2100.

51. Because the Secretary of State suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;”

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

52. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

VIII. Analysis of the Proposed Rules

53. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

54. The Administrative Law Judge finds that the Secretary of State has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

IX. Broad Issues Relating to the Proposed Rules

Public Support for the Proposed Rules

55. Overall, there was general support for the proposed rules expressed by organizations such as the League of Women Voters Minnesota, the Minnesota Disability Law Center, Education Minnesota, Take Action Minnesota, Minnesota Council of Nonprofits, Minnesota State University Student Association, and Arc Greater Twin Cities, as well as several individuals who have had difficulty voting in past elections.⁷¹ These groups supported the proposed rules and commended the Secretary of State for attempting to make the electoral process more accessible and less intimidating, particularly for first-time voters or those who attempt to register on the day of an election.

56. Some groups suggested that the Secretary of State add even more types of identification that could be presented as additional proof of residence on election day, such as out-of-state drivers' licenses and out-of-state identification cards.⁷² The Secretary of State has indicated that it will consider these suggestions in future rulemaking proceedings.

Unfunded Mandates

57. State Representatives Laura Brod and Tom Emmer objected to the timing of the proposed rules as an attempt by the Secretary of State to "subvert the legislative process."⁷³ They argued that the legislative process is the more appropriate method by which to accomplish change regarding voter registration and absentee voting. Specifically, the Representatives asserted that the proposed rules are unfunded mandates being placed on municipalities, cities, counties, postsecondary institutions, and the taxpayers of Minnesota. Representatives Brod and Emmer criticized the Secretary of State for failing to request a fiscal note for these proposed changes and questioned the OSS's determination that the cost of the proposed rules would not exceed \$25,000 in the first year for small cities.⁷⁴ They also urged the OSS to introduce its proposals in the Legislature, where the process would be open and transparent.

58. In its post-hearing comments, the Secretary of State responded that it has followed the procedural requirements of the rulemaking process, which do not require a fiscal note. Further, the OSS points to the determination by the Commissioner of Finance that "the proposed rule revisions will have some fiscal impact on local governments, but that impact should be offset by process improvement and cost saving opportunities afforded by the new rules."⁷⁵ The Secretary of State also referred to its

⁷¹ Exs. 10, 11, 12, 13, 16, 17, 18, 19 and 22. See also, comments of Arc Greater Twin Cities, dated February 14, 2008.

⁷² Exs. 18 and 19.

⁷³ Comments of Representatives Brod and Emmer, dated January 23, 2008.

⁷⁴ *Id.*

⁷⁵ Attachment to the Secretary of State's comments, dated February 22, 2008.

addendum to the SONAR, which shows that its original cost estimates were high, and that upon reevaluation, the costs will actually be less than projected.

59. The Administrative Law Judge acknowledges the arguments of Representatives Brod and Emmer, but notes that initiation of this rulemaking process is within the scope of existing legislation, and within the OSS's permissible discretion. The affected public has been afforded a full opportunity to participate in this process.

X. Rule-by-Rule Analysis

Part 8200.1100

60. One of the changes to proposed rule part 8200.1100 increases the size of voter registration applications returned by mail from six inches by 8-9/16 inches to 8-1/2 inches by 11 inches. The Secretary of State proposed to make this change because the Help America Vote Act recently required voter registration applications to include additional questions and information, making the existing applications crowded and difficult to read.⁷⁶ Increasing the size of the applications, according to the OSS, will make the application easier to read and fill out, and therefore, easier to gather data for data entry. The OSS further asserts that 8-1/2 by 11 inches is a standard paper size, making it easier to store and less expensive to print.⁷⁷ The proposed rule allows county auditors to consume their existing stock of voter registration applications on hand as of January 1, 2008.

61. At the hearing, the Secretary of State submitted an addendum to its SONAR, in which it revised its estimate of the number of voter registration applications it would be ordering from 3 million to 1 million.⁷⁸ The revised estimates also indicated that the savings to local governments may not be as large as previously anticipated based on mailing costs for the larger sized applications, but the OSS estimated that these higher mailing costs would be offset by allowing local governments to replace many of these forms with different forms for registering in person. The OSS also projected that local election officials would spend approximately \$8,000 more if applications are printed under the current rules than if they were printed under the proposed rules.⁷⁹

62. The Republican Party of Minnesota ("RPM") objected to this increase in size, asserting that printing costs will more than double based on the increased size of the application.⁸⁰ The RPM further argued that the additional cost is not a one-time cost, but will occur at every election. Also problematic to the RPM is that existing stock may be used up before printing according to the proposed size specifications. The RPM worried that the use of two differently sized applications in the same election will cause

⁷⁶ SONAR at 10.

⁷⁷ *Id.* at 11.

⁷⁸ Ex. 8.

⁷⁹ *Id.*

⁸⁰ Comments of Trimble & Associates, dated February 11, 2008, at 1.

confusion among voters.⁸¹ Overall, the RPM is not convinced that the Secretary of State has adequately predicted the potential costs of the new application form or justified the larger size, particularly as it relates to small municipalities.

63. The Minnesota Association of County Officers (“MACO”) offered support for the proposed language of Part 8200.1100, largely repeating the points made by the Secretary of State in the SONAR.⁸²

64. The Secretary of State respectfully disagreed with the RPM and referred again to the arguments in the SONAR and its addendum. The OSS also reiterated that it has complied with all the cost determination requirements of the rulemaking process.⁸³

65. The Administrative Law Judge finds that the Secretary of State has adequately justified the proposed changes to Part 8200.1100. The Administrative Law Judge notes the support offered by MACO, which is an organization made up of the very officials that regularly deal with the printing of voter registration applications. The changes are needed and reasonable and have a rational basis in the record.

Part 8200.4000

66. The Secretary of State proposes the following new rule part regarding the processing of federal post card applications:

Any federal post card application received from a member of the armed forces of the United States or from a person currently residing in Minnesota but temporarily living in another county must be processed as a voter registration application and, if the application is properly completed, the information on that application must be entered into the statewide voter registration system.

67. The OSS argues that this new rule part is necessary to comply with the Uniformed and Overseas Citizens Absentee Voting Act⁸⁴ that requires federal post card applications received from members of the military and others living temporarily overseas suffice to register these individuals to vote.⁸⁵

68. State Representatives Laura Brod and Tom Emmer commented that they believe the use of the word “person” in this proposed rule part is vague and “opens the door for potential abuse of the voting system.”⁸⁶ Representatives Brod and Emmer did not propose any modified language. The RPM expressed a similar concern, in that a

⁸¹ *Id.*

⁸² Supplemental comments of MACO, dated February 22, 2008. The supplemental comments amended statements made by MACO in its comments dated February 20, 2008.

⁸³ Comments of the Secretary of State, dated February 22, 2008, at 10.

⁸⁴ 42 U.S.C. § 1973 ff-1.

⁸⁵ SONAR at 12.

⁸⁶ Comments of Representatives Brod and Emmer, dated January 23, 2008.

“person” under traditional legal definitions includes entities such as a corporation, who are not eligible to vote.⁸⁷

69. The Minnesota Association of County Officers (“MACO”) suggested that the term “eligible voter” be used in place of “person” or “individual.”⁸⁸

70. The Secretary of State responded that the word “person” is used frequently in the existing rules, and that the language is necessary to help local election officials distinguish which applicants are eligible to register and which are not. The OSS declined to make any changes to the proposed language without further explanation from Representatives Brod and Emmer.

71. The proposed new rule part is consistent with the federal statute, and its use of the word “person” is consistent with that statute and existing rule language. The OSS has shown proposed rule Part 8200.4000 to be needed and reasonable.

Part 8200.5100, subpart 1, item E

72. Item E of subpart 1 is new language introducing an additional method by which a qualified voter may prove residence and register at the precinct on election day. A resident of a “residential facility” may prove residence at a facility in the precinct “by having an employee employed by and working in a residential facility located in the precinct, who knows that the applicant is a resident of that residential facility, vouch for that facility resident, and sign the oath in Part 8200.9939, in the presence of the election judge.”⁸⁹ The facility’s employee is eligible to sign the oath only if:

(1) . . . his or her name appear(s) on a list of employees provided by the general manager or equivalent officer of the residential facility to the county auditor at least 20 days before the election; or

(2) [he or she] provide(s) a statement on the facility’s letterhead that the individual is an employee of the facility that is signed and dated by a manager or equivalent officer of the facility

73. The Secretary of State states that subitem 1 is reasonable because it reflects the employee voucher standard set out in 2005 in Minn. Stat. § 201.061, subd. 3 (b). As to subitem 2, the OSS proposes to add this language under its authority to approve additional proofs of residence as stated in Minn. Stat. § 201.061, subd. 3 (a)(2). The OSS argues that the language of subitem 2 is reasonable because most residential facilities operate with very limited resources and do not, or are not able to, think about facilitating voting for their residents until just days before an election, if at all.⁹⁰

⁸⁷ Comments of Trimble & Associates, dated February 11, 2008, at 2.

⁸⁸ Comments of MACO, dated February 20, 2008.

⁸⁹ Proposed item E goes on to define “residential facility” by referencing numerous statutory provisions.

⁹⁰ SONAR at 14.

According to the Secretary of State, in 2006, fewer than 16% of the more than 1500 residential facilities in Minnesota provided lists to county auditors before election day.⁹¹

74. Subitem 2 is the Secretary of State's way of giving residential facilities an additional means to facilitate the voting process of their residents. The OSS argues that providing a certified statement on the facility's letterhead signed by the manager of the facility to an election judge should suffice as proof of residence because, like all other same-day registrants, voters who register using an employee voucher will be sent a non-forwardable postcard after the election to verify their residence.⁹² If the voter's residence cannot be verified, then the OSS will investigate whether the vouching oath was fraudulent. The Secretary of State goes on to argue that a letter provided to election judges at the polling place in which the facility manager certifies that the voucher is an employee of the facility provides no less security than a certified list provided before election day and is much more convenient.

75. The Secretary of State briefly considered allowing residential facility employees to demonstrate their employment by providing to an election judge an ID badge from the residential facility or a business card.⁹³ The OSS ultimately rejected this option because not all residential facility employees have these items, but all facilities can generate a statement on letterhead. Representatives Brod and Emmer took issue with this decision and argued that it is not unreasonable to expect an employee of a residential facility to be able to show an ID badge or business card to prove that they are employees of the facility.⁹⁴

76. Several organizations and individuals commented in support of this new procedure, echoing the comments submitted by the Minnesota Disability Law Center ("MDLC").⁹⁵ Under the Help America Vote Act, the MDLC is required to assist individuals with disabilities access their voting rights and participate in the electoral process.⁹⁶ MDLC asserted that when Minn. Stat. § 201.061, subd. 3 went into effect in 2006, residential facilities were not aware that they had to send a list to the county auditor at least 20 days prior to an election. Upon learning of this procedure, many facilities considered it an administrative burden. Furthermore, lists generated at least 20 days prior to an election often do not reflect changes in staff that occur immediately before an election. MDLC believes that the proposed rule language resolves both of these concerns.⁹⁷

77. The Office of Governor Tim Pawlenty ("Office of the Governor" or "OTG") did not support the proposed new language in paragraphs 1 and 2. The Office of the Governor argues that the proposed text of subitems 1 and 2 is not consistent with the

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Comments of Representatives Brod and Emmer, dated January 23, 2008.

⁹⁵ Exs. 11, 12, 13, and 18. See *also*, comments of Arc Greater Twin Cities, dated February 14, 2008.

⁹⁶ Ex. 10.

⁹⁷ *Id.*

statutory authority in Minn. Stat. § 201.061, subd. 3 (b).⁹⁸ The OTG's first point of contention is that Minn. Stat. § 201.061, subd. 3 (b), requires the list of employees to be prepared by the "operator" of the facility, while item E, subitem 1 of the proposed rules refers instead to a "general manager or equivalent officer." The OTG expressed concern that the proposed language would potentially allow the list preparation and certification to be exercised by a number of employees within a facility, and not solely the "operator" as required by statute. Second, the Office of the Governor pointed out that the proposed language of item E, subitem 1 does not restate the statutory requirement that the managerial employee *verify* the address or *certify* the list of employees. The OTG questioned why the SONAR did not address this difference between the statute and the proposed rule.⁹⁹

78. The third issue addressed by the OTG involves item E, subitem 2. The OTG argues that this is a new procedure for qualifying employees to vouch for facility residents that is contrary to the language of Minn. Stat. § 201.061, subd. 3 (b).¹⁰⁰ The OTG suggests that the language of subitem 2 circumvents the statutorily required time and procedure for submitting lists of facility employees ahead of time and allows facilities to instead submit certified statements on election day. According to the Office of the Governor, the Secretary of State's reliance on Minn. Stat. § 201.061, subd. 3 (a)(2), is misplaced, because the statute allows an individual voter to prove residency by "presenting any document approved by the secretary of state as proper identification." The OTG argues that this is different from the statement of employees provided by the residential facility, in that the statement identifies employees who may vouch for voters who are residents of the facility and not the voters themselves.¹⁰¹ The OTG suggests that the Secretary of State is attempting to override the intent of the Legislature.

79. The Republican Party of Minnesota voiced many of the same points made by the OTG. Specifically, it pointed out that the intent of the Legislature in having the facility submit the list to the county auditor at least 20 days before the election was presumably to allow the county auditor time to verify the accuracy and/or authenticity of facilities and of the lists they produce.¹⁰² The RPM argues that the new language of subitem 2 eliminates that verification period and increases the possibility of voter fraud. Furthermore, the RPM asserts that in the language of subitem 2, the Secretary of State has created an *ad hoc* system that is effectively regulated by election judges instead of county auditors.¹⁰³ For example, each election judge in each precinct, as he or she reviews facility statements presented on election day, may have a different idea of what is considered a "general manager or equivalent officer," thereby creating disparity and unequal treatment of voters.

⁹⁸ Comments from the Office of Governor Tim Pawlenty, dated February 13, 2008, at 2.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Comments of Trimble & Associates, dated February 11, 2008, at 3.

¹⁰³ *Id.* at 3-4.

80. The Secretary of State addressed each of these points. As to the argument against the use of the phrase “general manager or equivalent officer,” the OSS states that the use of that language will actually aid facilities and election officials in determining which facility management personnel can create the list of employees. In other words, the use of the phrase “general manager or equivalent officer” helps to interpret the statutory term “operator.”¹⁰⁴ The OSS also states that residential facilities are generally operated by corporations or other entities, not by individuals, and that any number of persons, at various levels within the entity or even outside the entity, may be designated as agents of an entity. In the opinion of the Secretary of State, the “operator” of a facility is often the same as the “general manager.”¹⁰⁵ Overall, the OSS believes that the proposed language in subitem 1 is consistent with the law cited by the Office of the Governor, in that the representative of the facility with the best knowledge is asked to provide county auditors and election judges with information to be relied upon in the election process. According to Minn. Stat. § 201.221, the OSS has authority to adopt rules consistent with state law.

81. As to the OTG’s argument that the Secretary of State has not repeated the “certify” language of the statute in the proposed rule at item E, the OSS states that it is not required to repeat the statute verbatim, and that it has not made any statements inconsistent with the statute. The Secretary of State also acknowledged that the language of the statute supersedes the language of the rule, and stated that the lack of repetition of the statutory provisions in the rule is of no legal significance.¹⁰⁶ The OSS did indicate a willingness to change the proposed language if recommended by the Administrative Law Judge. A change to repeating of statutory language would be needed and reasonable and would not constitute a substantial change to the rules proposed initially. The Administrative Law Judge makes no specific recommendation for that change, leaving the choice to the discretion of the OSS.

82. The Secretary of State responded to the assertion that it lacked authority to introduce an additional procedure as proposed in subitem 2, by pointing to the language of Minn. Stat. § 201.061, subd. 3 (a)(4), which states that an individual may prove residence for purposes of registering by:

- (4) having a voter who is registered to vote in the precinct, or who is an employee employed by and working in a residential facility in the precinct and vouching for a resident in the facility, sign an oath in the presence of the election judge vouching that the voter or employee personally knows that the individual is a resident of the precinct.

According to the OSS, while the provision by the facility to the county auditor of a list of employees at least 20 days prior to the election is a method of verifying the assertion that the person vouching is in fact an employee as described in subd. 3 (a)(4), it does

¹⁰⁴ Comments of the Secretary of State, dated February 22, 2008, at 4-5.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 5.

not cover all circumstances.¹⁰⁷ In an environment where there is often a great deal of employee turnover, allowing facilities to identify employees correctly on election day is consistent with the language of subd. 3 (a)(4).

83. According to the Secretary of State, the language of Minn. Stat. § 201.061, subd. 3 (b), requiring residential facilities to certify lists of their employees at least 20 days prior to the election, is directive and not exclusive.¹⁰⁸ The OSS believes that the election day procedure that it has proposed is a means to allow employees who are hired by the facility in the 20 days before the election to vouch for facility residents. Nothing in Minn. Stat. § 201.061, subd. 3 (b), prohibits those new employees from vouching for facility residents, and nothing in the proposed rule at item E, subitem 2 permits a residential facility to circumvent the language of the statute.

84. As to the argument of the RPM that election judges will not have time to verify the accuracy or authenticity of a statement from a facility provided on election day, the Secretary of State notes that nowhere in statute or rule is there a requirement for verification of information received from residential facilities under the existing procedure.¹⁰⁹ The Secretary of State referred to the felony penalties under Minnesota law, as well as the penalties for violating voter registration laws stated in Minn. Stat. § 201.27, subd. 3, as the means of enforcing the procedure in § 201.061, subd. 3 (b).

85. The OSS addressed the RPM's concern about election judges and disparate treatment of voters on election day by noting that election judges are all trained in the election day registration process consistently through the Secretary of State and local officials.¹¹⁰

86. The Administrative Law Judge finds that the Secretary of State has adequately addressed each of the concerns regarding Minn. R. 8200.5100, subpart 1, item E, put forth by the Office of the Governor, the RPM, and any other comments addressing this issue. The OSS has demonstrated that its proposed rule language does not run afoul of its statutory authority and is needed and reasonable to protect and enforce the electoral process.

Part 8200.5100, subpart 2, item B

87. Subpart 2 provides a list of photo identifications that may be used in combination with a document with a current address in the precinct to provide proof of residence. Item A is a list of the acceptable photo IDs and item B is a list of the acceptable documents.¹¹¹ Item B is proposed for amendment, as follows:

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.*

¹¹¹ SONAR at 14.

B. ~~An original bill for gas, electric, telephone, cellular telephone, cable television, solid waste, water, or sewer services is acceptable as an additional proof of residence under this subpart if:~~

~~(1) the bill shows the voter's name and address in the precinct; and telephone, television, or Internet provider services, regardless of how those telephone, television, or Internet provider services are delivered; or~~

~~(2) gas, electric, solid waste, water, or sewer services, is acceptable as an additional proof of residence under this subpart if:~~

~~(a) the bill shows the voter's name and current address in the precinct; and~~

~~(b) the due date on the bill is within 30 days before or after election day.~~

88. The Secretary of State asserts that it is reasonable to clarify that telephone, television, and Internet provider service bills may be used regardless of how the services are delivered because it accommodates today's fast-paced technological advances, yet is general enough in nature so that the rules will not need to be continually updated as new technologies arise.¹¹²

89. This proposed change to the rules generated support from a variety of interested entities. Minnesota Association of County Officers, Education Minnesota, Take Action Minnesota, Minnesota Council of Nonprofits, Minnesota State University Student Association, and the League of Women Voters all commended the Secretary of State for this change in the rules.¹¹³ Several of the organizations stated that they received numerous questions on past election days regarding confusion about what types of telephone, television, and Internet provider service bills were acceptable as proof of residence in conjunction with an appropriate ID. The League of Women Voters stated that this is one of several proposed changes to the rules that would increase accessibility to the electoral process and make it less intimidating for first-time voters or those who have moved since the last election.¹¹⁴

90. There was also opposition to this proposed change. The Republican Party of Minnesota objected to the phrase "regardless of how those telephone, television or Internet provider services are delivered" as "clearly arbitrary and capricious and lacking any rational relationship to even a minimal standard for verification of residency."¹¹⁵ The RPM argued that cellular telephone and Internet services are different from traditional utility bills (water, sewer, etc.) because these services can be, and frequently are, rendered anywhere in the world without any necessary connection to a specific and

¹¹² *Id.* at 15.

¹¹³ Exs. 11, 12, 13, 18, 19, and 22. See also, comments of MACO, dated February 20, 2008, at 2.

¹¹⁴ Ex. 22.

¹¹⁵ Comments of Trimble & Associates, dated February 11, 2008, at 4.

fixed physical location. With the increased occurrence of on-line billing, where hard copies of the bills may never be mailed, the RPM argues that a cellular telephone or Internet account, even if billed to a particular address within a precinct, demonstrates no real evidence of that person's physical presence within that precinct.¹¹⁶

91. The RPM relies on Minn. Stat. § 200.031 to show that proof of physical presence is essential to demonstrating residence. It also cites case law interpreting Minn. Stat. § 200.031 and its precursor, arguing that the Minnesota Supreme Court has stated that the concept of residency is captured and best summarized by Minn. Stat. § 200.031 (i), and that the foremost considerations with respect to residency in the election context are physical presence and intent to reside at that location.¹¹⁷ Accordingly, the RPM asserts that the Secretary of State's proposed change to subpart 2, item B lacks a rational basis and must be rejected by the Administrative Law Judge.¹¹⁸

92. Representatives Brod and Emmer voiced similar concerns and suggested that this type of change should move through the legislative process so that it can be openly debated and resolved.¹¹⁹

93. In response to these concerns, the Secretary of State points out that cellular telephone bills are currently allowed in the existing rules, as shown above, and accordingly, the objections are to the status quo. As to Internet services, the OSS respectfully disagrees with the assertion that Internet services are not tied to a particular address, citing dial-up modems, cable modems, and satellite service.¹²⁰ The OSS also notes that telephone, television, and internet services are now often combined or "bundled," and that the addition of Internet service bills to the list of acceptable utility bills ensures that voters are treated equally.¹²¹

94. The Administrative Law Judge finds that the Secretary of State has shown a rational basis for the language at subpart 2, item B (see Findings 48 and 49), and also notes that there was public support for this change (see Finding 89). The concerns of fraud addressed by the RPM and Representatives Brod and Emmer are certainly valid, but the risk of such fraud is no greater under the proposed rules than it is under the existing rules. The proposed language addresses today's rapidly changing technology and facilitates access to the electoral process. Proposed Part 8200.5100, subpart 2, item B is found to be necessary and reasonable.

¹¹⁶ *Id.* at 4-5.

¹¹⁷ See, *Piepho v. Bruns*, 652 N.W.2d 40, 43 (Minn. 2002); see also, *Bell v. Gannaway*, 303 Minn. 346, 350, 227 N.W.2d 797, 801 (1975).

¹¹⁸ Comments of Trimble & Associates, dated February 11, 2008, at 5.

¹¹⁹ Comments of Representatives Brod and Emmer, dated January 23, 2008.

¹²⁰ Comments of the Secretary of State, dated February 22, 2008, at 11-12.

¹²¹ *Id.* at 12.

Part 8200.5100, subparts 3 and 4

95. Proposed rule Part 8200.5100, subpart 4 is a new subpart addressing additional proof of residence allowed for students at the November general elections. This new subpart largely mirrors existing subpart 3, but instead adds participation by the Office of the Secretary of State at the time of November general elections. Subparts 3 and 4 allow students at Minnesota postsecondary educational institutions to prove their residence on election day by presenting a current valid photo identification issued by the Minnesota postsecondary institution only if the institution certifies a list containing the voter's name, student identification number, and address within the precinct within a certain period of time before the election.

96. The chief difference between subpart 3 and subpart 4 is to whom the certification is made. Subpart 3 requires certification by the institution to the county auditor, while subpart 4 requires certification to the Secretary of State when the election involved is the November general election. Subpart 4 then requires the Secretary of State to process the data through its automated precinct-finder, produce a list with the students' names and addresses, and provide that list to the appropriate county auditor at least 14 days prior to the November general election. Proposed subpart 4 states, "[t]he list must be sorted by precinct and student last name and must be forwarded in an electronic format specified by the secretary of state or other mutually agreed upon medium."

97. At the hearing, the Administrative Law Judge raised questions about which list the Secretary of State was referring to in the preceding language.¹²² To clarify that provision, the Secretary of State has proposed the following modified language:

The lists provided by the secretary of state must be sorted by precinct and student last name and must be forwarded to the county auditors in an electronic format specified by the secretary of state. Alternatively, the list provided to the county auditors may be provided in another medium, if a written agreement specifying the medium is signed by the secretary of state and the county auditor at least 90 days before the November general election. A written agreement is effective for all elections until rescinded by either party.

98. The Secretary of State also proposes to make a similar modification at Minn. R. 8200.9115, subpart 3. The OSS expressed its intent to work with colleges, universities, and county auditors to determine which electronic formats will work for them and let them know well ahead of time what the requirements will be.¹²³

99. To correct an oversight and provide clarity and consistency in the proposed rules, the Secretary of State proposes to amend the last sentence of subpart 3 as

¹²² Transcript at 74-75.

¹²³ Comments of the Secretary of State, dated February 14, 2008.

follows: “The auditor shall notify all postsecondary educational institutions in the county of the provisions of ~~this subpart~~ subparts 3 and 4.”

100. These three modifications suggested by the OSS have been shown to be needed and reasonable, and do not make rule Parts 8200.5100, subparts 3 and 4, and 8200.9115, subpart 3 substantially different from the rules as initially proposed.

101. Another difference between subparts 3 and 4 generated some public controversy. Since 1991, Minn. Stat. § 135A.17 has allowed postsecondary institutions that enroll students accepting state or federal financial aid to prepare a current list of students enrolled in the institution and residing in the institution’s housing or within ten miles of the institution’s campus. The list must include each student’s current address and be certified and sent to the appropriate county auditor for use in election day registration as provided in Minn. Stat. § 201.061, subd. 3. The rules have never provided direction for institutions providing lists of students living outside of the institutions’ housing.¹²⁴

102. In proposing the language of subpart 4, the Secretary of State has proposed to include students who are not residing in the institutions’ housing and living more than 10 miles from the institution. The Secretary of State asserts that doing so will make it easier for postsecondary institutions and election officials to administer the rules, and provide equal treatment for all students who do not live in university housing “instead of providing an advantage to those who live 9 miles from the institution that is not available to those who live 11 miles away.”¹²⁵ The Secretary of State cites Minn. Stat. § 201.061, subd. 3 (a)(3)(i), as its authority to adopt this proposed language. This statutory provision allows student voters to prove their residency by providing: “(i) a current valid student identification card from a postsecondary educational institution in Minnesota, if a list of students from that institution has been prepared under section 135A.17 and certified to the county auditor in the manner provided in rules of the secretary of state.” The OSS argues that it is reasonable for it to implement a system in which data is processed by the OSS to create a unified list before returning that list to the county auditor.¹²⁶

103. The Office of the Governor commented that proposed subpart 4 creates a new procedure for use of student identification cards for same-day registration that does not conform to the statutory requirements of Minn. Stat. §§ 201.061, subd. 3 (a)(3)(i) and 135A.17.¹²⁷ The OTG acknowledged that the language of Minn. Stat. § 135A.17 is permissive and does not mandate that postsecondary institutions create a student list. But the OTG went on to say that if an institution chooses to create the list, the institution must comply with the statutory requirements. The OTG also argued that the proposed

¹²⁴ SONAR at 16.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Comments from the Office of Governor Tim Pawlenty, dated February 13, 2008, at 3.

rule contradicts existing law because it requires postsecondary institutions to submit student lists to the Secretary of State instead of county auditors.¹²⁸

104. The Office of the Governor went on to argue that the proposed rule part creates a system that overlaps with the statute and will create confusion for postsecondary institutions, election judges, and students.¹²⁹ Finally, the OTG opined that the creation of a state-wide database of postsecondary students' names and addresses may have unforeseen data privacy implications. Such a list may be considered public data available to any person upon request, including credit card issuers and persons who would sell the list to credit card issuers. The OTG argues that this would defeat the purpose of the 2007 amendment to Minn. Stat. § 135A.145, which prohibits postsecondary institutions from giving credit card issuers address or contact information for students.¹³⁰

105. The Republican Party of Minnesota also objected to the proposed addition of subpart 4, putting forth some of the same arguments as the OTG. The RPM argued that the proposed language exceeds the statutory authority of the Secretary of State at Minn. Stat. § 135A.17, subd. 2, by deleting the 10-mile radius requirement and by creating a category of individuals who are ineligible for inclusion on the list (individuals who reside in housing owned by a postsecondary educational institution but are not students enrolled in the institution).¹³¹ The RPM also suggested that references in the proposed rule to "postsecondary institutions" should also add the qualifier "that enroll students accepting state or federal financial aid" to conform to the language of Minn. Stat. § 135A.17, subds. 1 and 2.¹³² Representatives Brod and Emmer similarly objected to proposed subpart 4.¹³³

106. The proposed change to the rules also generated significant support from interested organizations. Minnesota Association of County Officers ("MACO"), Education Minnesota, Take Action Minnesota, Minnesota Council of Nonprofits, Minnesota State University Student Association ("MSUSA"), and the League of Women Voters all commended the Secretary of State for this change in the rules.¹³⁴ MSUSA expressed concern that the current restriction regarding the 10-mile radius is difficult to implement because there is a lack of clarity regarding where the 10-mile radius begins. MSUSA asserted that the proposed rules would ease the list reporting process for postsecondary institutions and facilitate voting for more students.¹³⁵ MACO believes that those opposed to proposed subpart 4 are misunderstanding the use of student lists for election day registration. MACO commented:

¹²⁸ *Id.* at 3-4.

¹²⁹ *Id.* at 4.

¹³⁰ *Id.* at 5.

¹³¹ Comments of Trimble & Associates, dated February 11, 2008, at 5.

¹³² *Id.*

¹³³ Comments of Representatives Brod and Emmer, dated January 23, 2008.

¹³⁴ Exs. 11, 12, 13, 18, 19, and 22.

¹³⁵ Ex. 19.

The secretary of state's original rulemaking on this subject in 1986 limited the scope of the student lists received from colleges and universities to students who resided in housing that was owned, operated, leased or otherwise controlled by the institution. This was not a legislative requirement, but simply the secretary of state's decision at that point in time on how to implement this new provision. As such, it is our view that the secretary of state has the legal authority to revise or amend the rule as needed, in this case by expanding the scope of the rule to include students who do not reside in the institution's housing. We note that Minn. Stat. § 135A.17 was not enacted by the legislature until 1991 and that, in our view, these provisions are complementary to and not in conflict with the secretary of state's prior rulemaking.¹³⁶

MACO acknowledged that the proposal for the Secretary of State to provide a precinct-by-precinct list of college students for general elections is being made at their request. The organization believes that this proposal will improve the process of registering students at the polling place in general elections by providing this information in a standard and efficient manner.¹³⁷

107. The Secretary of State responded to each of the comments in opposition to subpart 4. The OSS agrees that proposed subpart 4 creates a new procedure for use of student identification cards that is different from existing law, but argues that the language of Minn. Stat. §§ 135A.17 and 201.061, subd. 3 (a)(3)(i) is not exclusive.¹³⁸ The Secretary of State cited its broad authority under Minn. Stat. § 201.061, subd. 3 (a)(2), to approve documents for proper identification, and, like MACO, argued that the enactment of Minn. Stat. §§ 135A.17 and 201.061, subd. 3 (a)(3)(i) in 1991 did not extinguish the OSS's statutory authority that existed in 1986, namely Minn. Stat. § 201.061, subd. 3 (a)(2).¹³⁹

108. The OSS respectfully disagrees with the OTG's assertion that proposed subpart 4 will create an overlapping and confusing system. Commending the individuals who serve as election judges, the Secretary of State points out that these are capable individuals who can be trained to handle one additional method of registration for students on election day.¹⁴⁰ The OSS rebuts the OTG's concern about protecting the privacy of students by pointing out that Minn. Stat. § 135A.145 does not address government agencies, and so does not apply here. The OSS also notes that Minn. Stat. § 135A.17 is not excepted in Minn. Stat. § 135A.145, so presumably, the student lists are already at risk under the current system. Finally, the OSS reiterates that the provision of information to the Secretary of State is entirely optional for postsecondary institutions.¹⁴¹ As to the RPM's concerns about the proposed language,

¹³⁶ Comments of MACO, dated February 20, 2008, at 2-3.

¹³⁷ *Id.* at 3.

¹³⁸ Comments of the Secretary of State, dated February 22, 2008, at 7.

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.* at 9-10.

the OSS notes that the current rule does not reference only colleges accepting state or federal financial aid.¹⁴²

109. The Administrative Law Judge finds that the Secretary of State has demonstrated the need for and reasonableness of the proposed language at subpart 4, and again notes the public support for this change. The OSS has shown that the proposed subpart 4 has a rational basis and does not exceed the Secretary of State's statutory authority.

Part 8200.9315

110. Part 8200.9315 governs the process of the Secretary of State and county auditors when entering information from a voter registration application into the statewide registration system. The OSS is proposing to remove the requirement that the Secretary of State and county auditors "notify the appropriate county auditor if the applicant has moved from another county in the state in which the registrant was previously registered." The OSS justifies this proposed change as necessary to ease election administration.¹⁴³ The statewide voter registration system makes this requirement obsolete because each county no longer keeps separate records of voters registered in their jurisdiction.

111. The Republican Party of Minnesota and State Representatives Brod and Emmer objected to the proposed change, stating that the Secretary of State has not provided a rational basis for eliminating this requirement, which can help reduce fraud and maintain uniformity and consistency of voter registration lists throughout Minnesota.¹⁴⁴ The Representatives suggested that this issue deserved further discussion in the legislative process.¹⁴⁵

112. MACO supported the proposed change and commented that the requirement for one county auditor to notify another county auditor whenever a voter moved from one county to another was previously required by the former Minn. R. 8200.3200, which was repealed in 1996.¹⁴⁶ MACO agreed with the OSS that the statewide voter registration system has made this requirement obsolete.

113. In its responsive comments, the Secretary of State restated the arguments set out in the SONAR as sufficient to address the concerns of the RPM and Representatives Brod and Emmer. In addition, the OSS referred to Minn. R. 8200.9310, subp. 5, which requires a verification to be conducted when a voter has moved and updates his or her voter registration. If the accuracy of the information

¹⁴² *Id.* at 12.

¹⁴³ SONAR at 18.

¹⁴⁴ Comments of Trimble & Associates, dated February 11, 2008, at 6. Comments of Representatives Brod and Emmer, dated January 23, 2008.

¹⁴⁵ Comments of Representatives Brod and Emmer, dated January 23, 2008.

¹⁴⁶ Comments of MACO, dated February 20, 2008, at 3.

cannot be verified, the county auditor is required to contact the voter to obtain clarification.

114. The Administrative Law Judge finds that the proposed change to Part 8200.9315 has a rational basis in the record. It is necessary and reasonable to delete a requirement that has become obsolete.

Parts 8200.9939, 8200.9960, and 8210.0800

115. In each of these proposed rule parts, the Secretary of State proposes to add a line to a form, an oath, or an affidavit of eligibility, for the person completing the form, oath, or affidavit to include his or her email address. In each instance, the form states that the provision of an email address is optional. The Secretary of State asserts that including this line on these forms is reasonable because an email address is a convenient way for the county auditor to follow up with the person completing the form.¹⁴⁷

116. The RPM and State Representatives Brod and Emmer objected to the proposed addition of a line for an email address as raising data privacy issues.¹⁴⁸ The RPM argued that this proposed change has no relevance to residency and, therefore, that there is no reason for any governmental agency to collect this kind of information on voters or potential voters. The RPM did acknowledge that Minn. Stat. § 201.071, subd. 1, does allow voter registration applications to include the voter's email address, if provided by the voter.¹⁴⁹ Nonetheless, the RPM recommended strongly against the inclusion of a request, even if optional, on any forms completed by voters.

117. MACO supported the proposed additions to Parts 8200.9939, 8200.9960, and 8210.0800, because email is often quicker and more efficient than the U.S. mail or telephone when attempting to contact voters whose forms are illegible or questionable in some way.¹⁵⁰ MACO went on to note that under Minn. Stat. § 201.091, subd. 4, county officials and the Secretary of State are prohibited from disclosing information such as a voter's email address to the public.

118. The Secretary of State responded to the concerns of RPM and Representatives Brod and Emmer as moot, based on the language of Minn. Stat. § 201.071, subd. 1, as cited above. In addition, the OSS noted that existing voter registration applications have included a space for this information for a number of years, pursuant to statute.¹⁵¹

119. The Administrative Law Judge finds that the Secretary of State has adequately justified the proposed changes to Parts 8200.9939, 8200.9960, and

¹⁴⁷ SONAR at 19.

¹⁴⁸ Comments of Trimble & Associates, dated February 11, 2008, at 2. Comments of Representatives Brod and Emmer, dated January 23, 2008.

¹⁴⁹ Comments of Trimble & Associates, dated February 11, 2008, at 2.

¹⁵⁰ Comments of MACO, dated February 20, 2008, at 2.

¹⁵¹ Comments of the Secretary of State, dated February 22, 2008, at 2 and 10.

8210.0800. The Administrative Law Judge notes the support offered by MACO, which is an organization made up of the very officials that regularly deal with the printing of voter registration applications. The changes are needed and reasonable and have a rational basis in the record.

Part 8210.0500

120. Part 8210.0500 sets out instructions to absentee voters. The changes to this part are largely a reorganization of the current rules. Much of the current language is carried over into the proposed rules and refashioned in a more logical way.¹⁵²

121. The comments from the RPM and Representatives Brod and Emmer, brought to the attention of the Secretary of State that a statement in the current (and proposed) rules is inconsistent with Minn. Stat. § 203B.08, subd. 1, which allows an absentee voter to designate an agent (without regard to candidacy), and permits that agent to deliver return envelopes of not more than three voters.¹⁵³ The rules, both existing and proposed, prohibit the agent from being a candidate, directly contradicting the statute, in Part 8210.0500, subparts 2 and 3.

122. As a result, the Secretary of State proposes the following change to the parentheticals at subpart 2, step 8, and subpart 3, step 10: ~~(this person cannot be a candidate and cannot return ballots for more than three voters)~~ (this person cannot return ballots for more than three voters). The OSS asserts that this modification to the proposed rules is not a substantial change to the rules as originally published because it is within the scope of the matter announced in the Notice of Hearing and is a logical outgrowth of the Notice. The modified language now accurately reflects Minn. Stat. § 203B.08, subd. 1.

123. The Administrative Law Judge finds that the Secretary of State has shown that the proposed reorganization of Part 8210.0500 is needed and reasonable. The Administrative Law Judge finds further that the modification to the rules as originally proposed is not a substantial change, and is necessary and reasonable to comply with Minn. Stat. § 203B.08, subd. 1.

¹⁵² SONAR at 21.

¹⁵³ Comments of Trimble & Associates, dated February 11, 2008, at 6. Comments of Representatives Brod and Emmer, dated January 23, 2008.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Secretary of State gave proper notice in this matter. The OSS has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The OSS has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

3. The OSS has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii).

4. The additions and amendments to the proposed rules suggested by the OSS after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Secretary of State from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: March 24, 2008.

/s/ Richard C. Luis

RICHARD C. LUIS

Administrative Law Judge

Recorded: Reported by Shaddix & Associates
Transcript (one volume)